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No. _____

In The

Supreme Court of the United States

WILLIAM O. STEELE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an indictment charging a practitioner (as defined in Section 802[21] of Title 21, United States Code) with dispensing a controlled substance in violation of Section 841(a)(1) of Title 21, United States Code, meet the constitutional standards for an indictment established by the Fifth and Sixth Amendments to the United States Constitution if it fails to allege that the defendant's conduct in dispensing the controlled substance was outside the scope of professional practice?

PARTIES TO PROCEEDING

All of the parties to this proceeding are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, William O. Steele, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this matter on June 25, 1999, which said judgment affirmed a conviction of the petitioner in the United States District Court for the Northern District of Florida for dispensing controlled substances in violation of Section 841(a)(1) of Title 21, United States Code.

OPINIONS BELOW

Four opinions of the United States Court of Appeals for the Eleventh Circuit have been rendered in this case. The en banc opinion which discusses the issue raised in this petition, but which does not make a final decision in Petitioner's appeal, was rendered on July 29, 1998 and is reprinted in Appendix A hereto and reported at 147 F.3d 1316 (11th Cir. 1998). The panel opinion which decided Petitioner's appeal and affirmed his conviction was rendered on June 25, 1999, and is reprinted in Appendix B hereto and reported at 178 F.3d 1230 (11th Cir. 1999). A panel decision rendered on February 11, 1997, which reversed Petitioner's conviction, is reprinted as Appendix C hereto and is reported at 105 F.3d 603 (11th Cir. 1997). A panel decision on rehearing rendered on July 24, 1997 is reprinted in Appendix D hereto and is reported at 117 F.3d 1231 (11th Cir. 1997).

JURISDICTION

The Petitioner was convicted in the United States District Court for the Northern District of Florida on four counts of violating section 841(a)(1) of Title 21, United States Code, and was sentenced on September 7, 1994 to a term of imprisonment and a fine. He appealed this conviction to the United States Court of Appeals for the Eleventh Circuit which affirmed his conviction by a decision rendered on June 25, 1999. The jurisdiction of this Court is invoked pursuant to Section 1254(1) of Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions, all of which are set out in Appendix E hereto:

1. The Fifth Amendment to the Constitution of the United States.

2. The Sixth Amendment to the Constitution of the United States.

3. Section 841(a)(1) of Title 21, United States Code.

4. Section 822(b) of Title 21, United States Code.

5. Section 823(f) of Title 21, United States Code.

6. Section 802(10) of Title 21, United States Code.

7. Section 802(21) of Title 21, United States Code.

8. Section 885(a)(1) of Title 21, United States Code.

STATEMENT OF THE CASE

The Petitioner, a registered pharmacist employed by and working for a registered pharmacy, was indicted and convicted following a trial in the United States District Court for the Northern District of Florida on four counts of violating Section 841(a)(1) of Title 21, United States Code, by dispensing controlled substances from the pharmacy where he worked. Except for the description of the controlled substance, each count of the indictment was identical. Count 1, for example, reads as follows:

> That from on or about July 1, 1993, and continuously thereafter, up to and including on or about November 2, 1993, in the Northern District of Florida, the defendant,
>
> WILLIAM O. STEELE
>
> did knowingly and intentionally dispense hydromorphone hydrochloride, a schedule II controlled substance, commonly known as Dilaudid, in violation of Title 21, United States Code, Section 841(a)(1).

The Petitioner challenged the sufficiency of the indictment by motion in the District Court and his motion was denied.

Petitioner appealed his conviction to the United States Court of Appeals for the Eleventh Circuit. In his appeal the Petitioner challenged the sufficiency of the indictment on the grounds that it failed to allege an essential element of the offense charged, i.e., that his conduct in dispensing controlled substances was outside the scope of the professional practice of a practitioner. A

panel decision of the Court of Appeals rendered on February 11, 1997 held the indictment to be insufficient because it failed to allege this essential element, and reversed the Petitioner's conviction (Appendix C). A decision rendered on rehearing by the same panel on July 24, 1997 wrote a superceding opinion, but reversed Petitioner's conviction (Appendix D). On petition for rehearing en banc the Court of Appeals vacated the panel decision and remanded the case to the panel for further consideration (Appendix A). On June 25, 1999 the panel affirmed the Petitioner's conviction (Appendix B).

On July 16, 1999 the United States Court of Appeals for the Eleventh Circuit entered an order staying the issuance of its mandate pending the filing and disposition of a petition for writ of certiorari in this Court.

REASONS FOR GRANTING THE WRIT

I. The decision of the United States Court of Appeals for the Eleventh Circuit in the present case is in conflict with the decision of another United States Court of Appeals on the issue of the sufficiency of an indictment charging a violation by a practitioner of Section 841(a)(1) of Title 21, United States Code.

The decision of the United States Court of Appeals for the Eleventh Circuit which this petition seeks to have reviewed finds an indictment sufficient even though it does not allege all the elements of the offense charged. This Court has held that to comply with the constitutional requirements for a grand jury indictment found in the Fifth and Sixth Amendments to the United States

Constitution an indictment must contain "the elements of the offense intended to be charged". *Russell vs. United States*, 369 U.S. 749, 763-64 (1961); see also, *Hamling vs. United States*, 418 U.S. 87 (1974). A mere repetition in the indictment of the words of the statute under which the prosecution is brought is not sufficient unless the words of the statute "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offence intended to be punished". *Russell vs. United States, supra* at 765 (quoting *United States vs. Carll*, 105 U.S. 611, 612 [1882]).

This Court has emphasized the importance of the constitutional requirement of a grand jury indictment by pointing to the grand jury as the "protective bulwark" between the citizen and an over zealous prosecutor. See *United States vs. Dionisio*, 410 U.S. 1, 16-17 (1973). This Court has emphasized the crucial role of the grand jury indictment by saying that the indictment, the independent product of the grand jury, limits the jeopardy of a defendant to the specific accusations the grand jury itself has determined and declared, and that this crucial right is defeated if an accusation can be extended to conduct the grand jury did not, upon careful consideration and under the solemnity of its oath, determine and declare in its indictment. See *Russell vs. United* States, *supra* at 770; *Stirone vs. United States*, 361 U.S. 212, 218, 219 (1960).

The indictment against the Petitioner in this case charges violations of Section 841(a)(1) of Title 21, United States Code. Each of the four counts charged that the Petitioner "did knowingly and intentionally dispense" a controlled substance. The term "dispense" is statutorily defined in Section 802(10) of Title 21, United States Code,

to mean "to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner." This statutory definition, it should be noted, contrasts sharply with the statutory definition of "distribute" (alternative conduct criminalized by Section 841[a][1]) set out in Section 802(11) of Title 21. The Petitioner is a registered pharmacist employed by a registered pharmacy, and is a practitioner as defined by Section 802(21) of the Title 21, United States Code. As a practitioner he is authorized by Section 822(b) of Title 21, United States Code, to legally dispense controlled substances.

Practitioners are prosecuteable under Section 841(a)(1) of Title 21, United States Code, for dispensing controlled substances even though statutorily authorized to do so; however, such prosecutions are maintainable only "when their activities fall outside the usual course of professional practice". See *United States vs. Moore*, 423 U.S. 122, 124 (1975). The rule announced in the *Moore* case surely means that dispensing outside the scope of professional practice is a predicate for illegality if the dispenser is a practitioner. Therefore, in view of this prerequisite for illegality, and in view of the statutory definition of "dispense", conduct outside the scope of professional practice is surely an essential element of a charge of dispensing in violation of Section 841(a)(1), which the grand jury must find and declare in its indictment when the accused is a practitioner. Under the principles stated in *Russell vs. United States, supra*, the failure of an indictment charging a practitioner with dispensing in violation of Section 841(a)(1) to allege this essential element renders the

indictment defective and insufficient to support a conviction.

A grand jury, of course, speaks only through the indictment it returns. It is only through the words of the indictment that the accused – and the court – are informed of what the grand jury considered and found. See *United States vs. Russell, supra* at 765, 769-70. The words of the indictment in this case only tell the accused and the court that the grand jury considered and found that the Petitioner "did . . . dispense" a controlled substance. Presumably, the term "dispense" is used in the indictment in the same sense it is defined in Section 802(10). Given this statutory definition this allegation denotes legal conduct because a practitioner is statutorily authorized to dispense controlled substances (see 21 U.S.C. § 822[b]) and because dispensing, in the absence of qualifying averments, is legal conduct in that it is by or pursuant to the lawful order of a practitioner (see 21 U.S.C. § 802[10]). On its face the indictment does not inform the court or the accused that the grand jury either considered or found conduct on the part of the Petitioner that is unlawful for a practitioner.

The United States Court of Appeals for the Fifth Circuit in *United States vs. Outler*, 659 F.2d 1306 (5th Cir. 1981), and the United States Court of Appeals for the Ninth Circuit in *United States vs. King*, 587 F.2d 956 (9th Cir. 1978), have held that dispensing outside the scope of professional practice is an essential element of an offense under Section 841(a)(1) when the accused is a practitioner and that an indictment charging a practitioner with violating or conspiring to violate Section 841(a)(1) is insufficient and defective if it does not contain an allegation of

conduct outside the scope of professional practice. These cases cite the principles set out in *Russell vs. United States, supra,* as the basis for their conclusion that such an indictment must set out each element of the offense charged. The *Outler* case specifically refers to *United States vs. Moore, supra,* in support of its conclusion that conduct outside the scope of professional practice is an essential element of a charge against a practitioner under Section 841(a)(1). The *King* case relies on Ninth Circuit precedents for its conclusion that conduct outside the scope of professional practice is an essential element of a charge against a practitioner under this statute.

Two panel decisions of the United States Court of Appeals for the Eleventh Circuit in the present case (annexed as Appendix C and Appendix D to this petition) followed *United States vs. Outler, supra,* and concluded that an indictment of a practitioner for dispensing controlled substances in violation of Section 841(a)(1) was defective if it did not contain an allegation of the essential element of dispensing outside the scope of professional practice. An en banc decision of the Eleventh Circuit (annexed hereto as Appendix A) overruled the panel decisions and overruled *United States vs. Outler, supra,* as a precedent in that Court. The United States Court of Appeals for the Third Circuit in *United States vs. Polan,* 970 F.2d 1280 (3rd Cir. 1992) and the United States Court of Appeals for the Sixth Circuit in *United States vs. Seelig,* 622 F.2d 207 (6th Cir. 1980) have held that an indictment charging a practitioner with dispensing controlled substances in violation of Section 841(a)(1) is not defective because it omits an allegation that the dispensing was outside the scope of professional practice.

A decision by this Court is necessary to resolve this conflict between the decisions of the Courts of Appeals on this important matter. A resolution of this conflict is especially important in view of the considerable volume of prosecutions for violations of Section 841(a)(1) in the various Circuits.

The decision of the United States Court of Appeals for the Eleventh Circuit which this petition seeks to have reviewed concluded that the statutory authorization for a practitioner to dispense controlled substances within the scope of professional practice is an affirmative defense, and for this reason held the indictment in this case is saved by the provisions of Section 885 of Title 21, United States Code. This conclusion is erroneous in that it allows a statute prescribing the procedure for a criminal case to override the Fifth and Sixth Amendments' constitutional requirements for an indictment. Congress is without power to override a constitutional requirement by a statute. See *United States vs. Villamonte-Marquez*, 462 U.S. 579, 585 (1983); *Almeida-Sanchez vs. United States*, 413 U.S. 266, 272 (1973). Consequently, Section 885 of Title 21 cannot be constitutionally applied in this case to have the effect given it by the decision of the Court of Appeals.

II. The decision of the United States Court of Appeals for the Eleventh Circuit in the present case conflicts with a relevant decision of this Court dealing with prosecutions under statutes which make some, but not all, conduct of a certain type unlawful.

This Court has recognized that there are instances when pleading that a defendant is not within the exceptions of a penal statute may be required. See *United States*

vs. Vuitch, 402 U.S. 62 (1971). This Court has viewed statutes which criminalize some, but not all, conduct of a certain type as constitutionally suspect as denying due process in that they tend to create a presumption of guilt merely from engaging in conduct which may be entirely lawful. See, e.g., *United States vs. Vuitch, supra; Leary vs. United States*, 395 U.S. 6 (1969). To avoid this constitutional dilemma in prosecuting under such statutes this Court held in *United States vs. Vuitch, supra*, a case involving a District of Columbia statute similar in grammatical construction to Section 841(a)(1), that it is the burden of the prosecution to plead and prove the defendant's conduct was not of the lawful and permitted type.

The statute which the Petitioner is accused of violating by the indictment in this case is a statute which makes some, but not all, dispensing of controlled substances unlawful. The decision of the Court of Appeals which this petition seeks to review is in conflict with the principle enunciated in *United States vs. Vuitch, supra*, because it does not require the indictment to allege facts that show the particular conduct engaged in by the accused was unlawful.

CONCLUSION

For the reasons set out, Petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-3139

D.C. Docket No. 96-2461CV-DLG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross-Appellant,

versus

WILLIAM O. STEELE,

Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Florida

(Filed July 29, 1998)

Before HATCHETT, Chief Judge, TJOFLAT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL and MARCUS, Circuit Judges.

CARNES, Circuit Judge:

William O. Steele, a pharmacist, was indicted for "knowingly and intentionally dispens[ing]" controlled substances "in violation of title 21, United States Code, Section 841(a)(1)." The governing statute provides an

exception which permits pharmacists and other "practitioners" to dispense controlled substances "to the extent authorized by their registration and in conformity with other provisions of this subchapter," 21 U.S.C. § 822(b), which for present purposes means "in the course of professional practice," 21 U.S.C. § 802(21).

We granted en banc review to decide whether the indictment under which Steele was convicted is defective because it does not negate the course of professional practice exception. A panel of this Court answered that question in the affirmative and reversed Steele's conviction, *United States v. Steele*, 117 F.3d 1231 (11th Cir. 1997), *superceding*, 105 F.3d 603 (1997), because it was bound to do so by the prior panel decision in *Outler v. United States*, 659 F.2d 1306 (5th Cir. Unit B 1981). Because we are sitting en banc, we are not bound by the *Outler* decision. Being free to overrule it, we hold that an indictment of a practitioner for unlawfully dispensing drugs need not aver that it was done outside the course of professional practice. We believe this conclusion is compelled by 21 U.S.C. § 885(a)(1) ("It shall not be necessary for the United States to negative any exemption or exception set forth in this subchapter in any . . . indictment . . . ").

The panel's opinion, 117 F.3d at 1232-33, sets out the relevant facts, the most pertinent of which concern the contents of the four-count indictment returned against Steele for actions occurring while he was authorized as a pharmacist to dispense controlled substances in the course of his professional practice. Count one of the indictment charged:

> That from on or about July 1, 1993, and continuously thereafter, up to and including on or about November 2, 1993, in the Northern District of Florida, the defendant, William O. Steele, did knowingly and intentionally dispense hydromorphone hydrochloride, a schedule II controlled substance, commonly known as Dilaudid, in violation of Title 21, United States Code, Section 841(a)(1).

117 F.3d at 1233. Counts two, three, and four are identical except that the controlled substances named in them were Xanax, Valium, and Percodan, respectively. The government's theory of prosecution was that on numerous occasions during the specified period, Steele dispensed those controlled substances pursuant to prescriptions he knew to be forged. Steele maintained that he did not know they were forged. The jury found that he did and convicted him.

Steele contends there was insufficient evidence to convict, but the panel did not reach that issue. Instead, it held that the indictment was defective because it failed to allege that Steele dispensed the drugs outside the course of his professional practice as a pharmacist. *See*, 117 F.3d at 1232, 1235. The panel reached that holding reluctantly, because it believed that the plain language of 885(a)(1) obviated the need for such an allegation. Nonetheless, the panel felt bound to follow the holding in *Outler*, which was to the contrary. *See* 117 F.3d at 1235 & n.5 ("The holding in *Outler* stands in apparent conflict with section 885(a)(1) . . . [but] . . . even if it conflicts with statutory law, we are bound by *Outler* until such time as it is overruled.") The panel was correct in both respects. Under our prior precedent rule, a panel cannot overrule a

prior one's holding even though convinced it is wrong. *See, e.g., Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997) ("The law of this circuit is 'emphatic' that only the Supreme Court or this court sitting en banc can judicially overrule a prior panel decision."), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1529 (1998); *United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993) ("[I]t is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court."). However, we are not bound by *Outler*, and our examination of the relevant statutory provisions leads us to conclude, as the panel in this case did, that *Outler* was wrongly decided.

21 U.S.C. § 841(a) provides: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally (1) to . . . dispense . . . a controlled substance. . . . " The subchapter referred to is Subchapter I of Chapter 13 of Title 21, and that subchapter runs from § 801 through § 904.

One of the authorized exceptions to the proscription against dispensing controlled substances is contained in 21 U.S.C. § 822(b), which specifies that "Persons registered by the Attorney General under this subchapter to . . . dispense controlled substances are . . . authorized to possess . . . or dispense such substances . . . to the extent authorized by their registration and in conformity with the other provisions of this subchapter." "Dispense" means "to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance." 21 U.S.C.

§ 802(10). An "ultimate user" is "a person who has lawfully obtained . . . a controlled substance for his own use or for the use of a member of his household," 21 U.S.C. § 801(27), as by prescription from a practitioner. The term "practitioner" is defined to include "a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, [or] dispense . . . a controlled substance in the course of professional practice or research." 21 U.S.C. § 802(21).

The upshot of all those provisions is that because Steele was acting as an agent of a registered pharmacy, he was authorized to dispense controlled substances in the course of his professional practice as a pharmacist, but only pursuant to a prescription issued by a practitioner. *See* 21 U.S.C. § 829 (a)(b). That is undisputed. What is disputed between the parties is the meaning and effect of § 885(a)(1), which provides:

> It shall not be necessary for the United States to negative any exemption or exception set forth in this subchapter in any . . . indictment . . . or in any trial . . . and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.

The meaning of that provision, as it relates to the issue before us, is evident from its plain language: an indictment charging a violation of § 841(a)(1) need not negate the course of professional practice exception contained in § 822(b).

"In construing a statute we must begin, and often should end as well, with the language of the statute itself." *Merritt v. Dillard*, 120 F.3d 1181, 1185 (11th Cir. 1997). Where the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

Steele argues that *United States v. Moore*, 423 U.S. 122, 96 S.Ct. 335 (1975), stands for the proposition that a practitioner may be convicted for distributing and dispensing controlled substances only if the government pleads and proves that those activities were outside the course of professional practice. That is not what that case holds. Certiorari was granted in *Moore* to review a court of appeals decision that 21 U.S.C. § 841 does not apply to registered practitioners, such as the physician in that case, regardless of whether their distributing and dispensing were in the course of professional practice. The Supreme Court reversed, holding that § 841 does apply to registered practitioners when their activities fall outside the usual course of professional practice. *See id.* at 124, 96 S. Ct. at 336. However, the Court did not address the issue of whether the outside the course of professional practice factor was an element of the offense or whether the government was required to plead it in the indictment. It is worthy of note that the indictment in the *Moore* case alleged nothing about the course of professional

practice. *See Moore v. United States*, 506 F.2d 426, 446 n.2 (D.C. Cir. 1973) (dissenting opinion).

Steele also seeks support in *United States v. Vuitch*, 402 U.S. 62, 91 S.Ct. 1294 (1961), in which the Supreme Court stated: "It is a general guide to the interpretation of criminal statutes that when an exception is incorporated in the enacting clause of a statute, the burden is on the prosecution to plead and prove that the defendant is not within the exception." *Id.* at 70, 91 S.Ct. at 1298. The government counters by quoting the general rule announced in *McKelvey v. United States*, 260 U.S. 353, 357, 43 S. Ct. 132, 134 (1922), that: "[A]n indictment or other pleading founded on a general provision defining the elements of an offense . . . need not negative the matter of an exception made by proviso or other distinct clause."

Both the *Vuitch* and the *McKelvey* rules are rules of statutory construction, or "general guide[s] to the interpretation of criminal statutes," *Vuitch*, 402 U.S. at 90, 91 S. Ct. at 1298, and as such they are useful when Congress has not made its intent clear. In this case we have no need to rely upon such rules of construction, because Congress has explicitly and unambiguously stated in § 885(a)(1) that an indictment charging a defendant with violating § 841(a)(1) is not required to negate the course of professional practice exception. Congress could scarcely have been any clearer about that.

Steele protests that Congress could not have meant what it said in § 885(a)(1), because that would mean prosecutors could indict each and every pharmacist and doctor in the country for simply carrying out their professional duties. In other words, if we apply the statute as

written, the sky will fall, at least on pharmacists and doctors. Of course, if the sky starts falling, it could just as well fall on research scientists and on those who legitimately manufacture and transport controlled substances, as well as on every legitimate, prescription-holding ultimate user, because all are saved from the broad terms of §§ 841(a)(1) or 844(a) by exceptions that are also subject to the provisions of § 885(a)(1).

Steele does not explain why busy government prosecutors would want to indict any case that they are certain to lose when it goes to trial, if not sooner. We seriously doubt that the Department of Justice would tolerate the continued employment of any prosecutor who would do that. Steele's argument about government prosecutors indicting pharmacists and doctors for possessing and dispensing controlled substances in the course of their professional practice also fails to explain why that has not been a problem in the three circuits where the conclusion we reach today has long been the law. Twenty years ago the Seventh Circuit said that an indictment charging a physician with dispensing controlled substances need not allege that the prescriptions he wrote were outside the course of his professional practice. *See United States v. Roya*, 574 F.2d 386, 391 (7th Cir. 1978) ("An indictment founded on a general provision of a statute need not negative an exception made by a proviso or other distinct clause, whether in the same section or elsewhere."). Eighteen years ago the Sixth Circuit held that an indictment charging pharmacists with illegally distributing controlled substances need not allege that they acted outside the usual course of professional conduct. *See United States v. Seelig*, 622 F.2d 207, 211-12 (6th Cir. 1980). The same

rule has been in effect in the Third Circuit for six years. *See United States v. Polan*, 970 F.2d 1280, 1282 (3rd Cir. 1992) (indictment of physician for distributing and conspiring to distribute controlled substance not defective for failure to allege absence of legitimate medical reason). There has been no report of prosecutors running amuck in any of those jurisdictions. In any event, the concerns Steele puts forward implicate policy judgments that are within the province of Congress.

It is not the courts but Congress that defines crimes and defenses in the United States Code. Subject only to constitutional constraints, it has the authority to specify whether a given factor must be pleaded by the government in the indictment as an element of an offense, or affirmatively raised by the defense as part of its case. Steele contends that Congress overstepped its bounds with § 885(a)(1), because the course of professional practice factor is an element of the § 841(a)(1) offense, and all elements must be alleged in the indictment, *see, e.g., Russell v. United States*, 369 U.S. 749, 763, 82 S.Ct. 1038, 1047 (1962). An essential premise of that syllogism is that the course of professional practice factor is an element and not a defense, but that is not what Congress said when it definitively exercised its right to say. Instead, Congress said that the course of professional practice exception, indeed all exceptions to the prohibition against manufacturing, distributing, dispensing, and possessing controlled substances, are defenses not elements, and that their inapplicability need not be alleged in the indictment.

An indictment is sufficient "if it: (1) presents the essential elements of the charged offense, (2) notifies the

accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense." *United States v. Dabbs*, 134 F.3d 1071, 1079 (11th Cir. 1998). Because the indictment in this case does all of that, it is not defective.

In holding that an indictment charging a practitioner with violating 21 U.S.C. § 841(a)(1) need not negative the course of professional practice exception, we join the Third, Sixth, and Seventh Circuits, *see Polan, Seelig*, and *Roya*, and we return to the pre-*Outler* position our predecessor Court took in *United States v. Ramzy*, 446 F.2d 1184 (5th Cir. 1971), which involved an earlier version of the current Controlled Substances Act. Like the other three circuits, we part company with the Ninth Circuit's position on this issue, *see United States v. King*, 587 F.2d 956, 962-65 (9th Cir. 1978) (two-to-one decision). One problem with the Ninth Circuit's majority opinion in *King*, as the Sixth Circuit has pointed out, *see Polan*, 970 F.2d at 1283, is that its analysis of this specific issue fails to focus upon § 885(a)(1), the key provision upon which the issue turns. The same is true of the opinion in *Outler*, the decision which we overrule today.

We have decided only a pleading issue – that the course of professional practice exception is an affirmative defense which need not be negated in the indictment. We have no occasion to address the issue of who bears the burden of persuasion, and how heavy that burden is, once the defendant goes forward with the evidence about it as § 885(a)(1) requires. The burden of persuasion issue is of no significance to the conviction under review in this case, because the district court instructed the jury that the

government bore that burden and could discharge it only by proof beyond a reasonable doubt. Whether a defendant is entitled to such an instruction is an issue we have no occasion to address.

Steele does raise other issues relating to his conviction that have not yet been addressed because the panel did not reach them. We express no view on those other issues, choosing instead to let the panel decide them. The same is true of the sentencing issue raised in the government's cross-appeal.

Having decided the issue on which we granted en banc review, this case is REMANDED TO THE PANEL for decision of the other issues raised in the appeal and the cross-appeal.

EDMONDSON, Circuit Judge, Concurring:

Today's court relies heavily on what we see as the plain language of the pertinent statute. I agree with the opinion and with the result. But I point out that we do *not* have before us today a statute that was enacted long ago. When those much older statutes are being construed by modern courts, our response as modern readers to the words of the statute may not be what the words meant to the Congress speaking at a very different time; and the idea of plain meaning becomes far more complicated.

APPENDIX B

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-3139

D.C. Docket No. 94-03055-RV

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross-Appellant,

versus

WILLIAM O. STEELE,

Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Florida

(June 25, 1999)

Before TJOFLAT and BIRCH, Circuit Judges, and SMITH*, Senior Circuit Judge.

BIRCH, Circuit Judge:

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* Honorable Edward S. Smith, Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

William O. Steele appeals his conviction for dispensing controlled substances in violation of 21 U.S.C. § 841(a)(1), and the government cross-appeals the district court's application of the U.S. Sentencing Guidelines. Steele argues that his conviction must be vacated on three grounds: (1) the indictment was insufficient to allow him to prepare a defense and protect against double jeopardy; (2) the government improperly used its peremptory strikes based on gender; and (3) insufficient evidence existed to support his conviction. The government argues that the district court based its decision to depart downward from the sentence range on improper grounds. We affirm Steele's conviction but vacate Steele's sentence and remand for resentencing.

I. Background

Steele was a registered pharmacist at North Hill Pharmacy in Pensacola, Florida. During several months in 1993, Steele filled numerous prescriptions presented by Larry and Gloria Ellis for such drugs as Dilaudid, Xanax, Valium, and Percodan. The government alleged that Steele knew when dispensing these drugs that Larry Ellis had forged the prescriptions.

A four-count indictment charged Steele with knowingly dispensing controlled substances in violation of § 841(a)(1). Count One of the indictment stated:

> That from on or about July 1, 1993, and continuously thereafter, up to and including on or about November 2, 1993, in the Northern District of Florida, . . . Steele, did knowingly and intentionally dispense hydromorphone hydrochloride, a schedule II controlled substance,

commonly known as Dilaudid, in violation of Title 21, United States Code, Section 841(a)(1).

R1-1-1. Each of the remaining three counts contained identical language to Count One, except that the government substituted the three other controlled substances in the place of Dilaudid.

During the trial, the government's main witness was Larry Ellis, who testified pursuant to a plea agreement. Ellis testified that he informed Steele that he was a drug addict and had phony prescriptions that he hoped Steele would fill. According to Ellis, Steele agreed to fill the prescriptions and specified a system by which Ellis and his wife, Gloria, could fill the prescriptions. Ellis further testified that under the system he and Steele communicated almost daily about what drugs would be dispensed, what the prescriptions should say, and how they should be presented to the pharmacy. Gloria Ellis also testified pursuant to a plea agreement about the steps she took to fill the prescriptions, but she stated that she did not know whether Steele was involved in the scheme. Among other witnesses, the government called another pharmacist and a clerk from the North Hill Pharmacy, who both testified that they were suspicious about the prescriptions and informed Steele about their suspicions, but that Steele filled the prescriptions anyway.

The jury convicted Steele on all four counts. The sentencing court determined that Steele's sentence range under the Sentencing Guidelines was 151-188 months. Acting pursuant to section 5K2 of the Guidelines, the court ordered a downward departure in Steele's offense level by eight levels, resulting in a sentence range of

63-78 months. The court then sentenced Steele to 63 months of imprisonment.

Steele appealed, and a panel of this court reversed Steele's conviction. *See United States v. Steele*, 105 F.3d 603, 607 (11th Cir. 1997) ("*Steele I*"), *superseded on reh'g*, 117 F.3d 1231 (1997) ("*Steele II*"). The panel reasoned that the government failed to charge in the indictment that Steele's conduct fell outside the statutory exception for dispensing controlled substances in the ordinary course of professional practice, as was required by the then-existing law of this circuit as stated in *United States v. Outler*, 659 F.2d 1306, 1309 (5th Cir. Unit B 1981). *See Steele II*, 117 F.3d at 1234-35. Rehearing the case *en banc*, however, the court overruled *Outler* as inconsistent with the plain text of § 841(a)(1) and 21 U.S.C. § 885(a)(1), and held that the indictment was sufficient despite its omission of the statutory exception. *See United States v. Steele*, 147 F.3d 1316, 1320 (11th Cir. 1998) (*en banc*) ("*Steele III*"). The *en banc* court then remanded the case for a resolution of Steele's remaining claims, which we now address in this opinion.

II. Sufficiency of the Indictment

Steele argues that, because the indictment does not specify the precise dates, locations, drug amounts, and purchasers for each time that he allegedly dispensed controlled substances, the indictment failed to permit him to prepare his defense as required by the Sixth Amendment, and failed to protect him against a second prosecution for the same offenses as required by the Fifth Amendment. Whether an indictment sufficiently alleges a

statutorily proscribed offense is a question of law that we review *de novo*. *See United States v. Shotts*, 145 F.3d 1289, 1293 (11th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 1111 (1999).

An indictment is sufficient "if it: (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense." *Steele III*, 147 F.3d at 1320 (quoting *United States v. Dabbs*, 134 F.3d 1071, 1079 (11th Cir. 1998)). We concluded in *Steele III* that the indictment in this case satisfies these three conditions, which implicitly rejects Steele's present arguments regarding the omission of precise dates, locations, drug amounts, and purchasers. Nonetheless, because the *en banc* opinion expressly decided only the issue of whether the indictment needed to allege a statutory exception, we will comment briefly upon Steele's arguments that additional information must have been alleged in the indictment.

We begin by noting that, under the terms of the statute, time, location, drug amount, and purchaser are not essential elements of the offenses charged in this case.[1] It is true that "[i]f a general description of the

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[1] This court has held that alleging that an offense occurred within a judicial district, such as the Northern District of Florida, is sufficient to describe the location of the offense. *See United States v. Yonn*, 702 F.2d 1341, 1348 (11th Cir. 1983). In addition, courts hold that the amount of drugs involved in an offense is not an element of the offense but rather is a factor to

offense is given then it is also necessary to allege facts and circumstances which will inform the defendant of the specific offense with which he is being charged." *Belt v. United States*, 868 F.2d 1208, 1211 (11th Cir. 1989). When charging a defendant of participating in a conspiracy, the government may discharge its obligations by referring to a certain duration of time. *See Yonn*, 702 F.2d at 1348. For non-conspiracy offenses, the government ordinarily is able to specify an exact date of the alleged offense in the indictment, but the law is well settled that a failure to do so does not in all circumstances preclude a defendant from preparing an adequate defense or protecting against double jeopardy.

> Although it is unusual for an indictment not to pin down the date of the crime with greater specificity than this, it is nonetheless hornbook law that great generality in the allegation of date is allowed – at least where, as here, the exact time of the crime's commission is not important under the statute allegedly violated.

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be considered upon sentencing, and therefore need not be alleged in the indictment. *See United States v. Dorlouis*, 107 F.3d 248, 252 (4th Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 2525, 138 L.Ed.2d 1025 (1997). We reject without further discussion Steele's argument that the indictment must specify the purchasers of the controlled substances, as no authority supports such a position. We therefore conclude that Steele's argument that an indictment alleging drug distribution must specify the locations, drug amounts, and purchasers is without merit, and we will focus our discussion in this opinion on the question of whether the indictment fails to specify with sufficient particularity the dates of the alleged offenses.

United States v. Nunez, 668 F.2d 10, 11-12 (1st Cir. 1981) (internal citation and quotation marks omitted) (per curiam); *see also United States v. Perez*, 67 F.3d 1371, 1377 (9th Cir. 1995) ("Furthermore, because time is not an element of the crime of distributing heroin, the indictment was not fatally broad for failing to include precise dates of distribution."), *withdrawn in part on other grounds*, 116 F.3d 840 (9th Cir. 1997); *United States v. Jaswal*, 47 F.3d 539, 542-43 (2d Cir. 1995) ("The failure to include the year in Count IV of the indictment is not fatally defective because the exact time when the defendants committed the crime in this case is immaterial.") (per curiam.); *Butler v. United States*, 197 F.2d 561, 562 (10th Cir. 1952) ("Where time is not an essential element of the offense, it is sufficient to charge facts which show that the offense was committed within the statutory period of limitation and in such a case, even though there be a defect in the allegation as to time, it is one of form only.").

In this case, the government alleged that Steele illegally dispensed four specific controlled substances within a period of four months. Because Steele filled counterfeit prescriptions, he has records and receipts to which he can refer to identify the dates of the alleged offenses. Given these circumstances and the law summarized above, we conclude that, although we would have preferred that the government provide more precise dates in the four counts contained in this indictment, the failure to do so did not preclude Steele from adequately preparing his defense. We further conclude that the four-month period specified in the indictment does not expose Steele to double jeopardy concerns because "the court may refer to the entire record of the prior proceeding and [will] not be

bound by the indictment alone." *See Jaswal*, 47 F.3d at 542-43 (internal quotation marks omitted). The indictment therefore complies with the Fifth and Sixth Amendments.

III. Discriminatory Peremptory Challenges

Steele next argues that the government exercised its peremptory challenges during *voir dire* in a way that impermissibly discriminated against women. We give great deference to a district court's findings on the issue of discriminatory intent in the exercise of peremptory challenges, and we review its findings for clear error. *See United States v. Tokars*, 95 F.3d 1520, 1533 (11th Cir. 1996), *cert. denied*, 520 U.S. 1132, 117 S. Ct. 1282, 137 L.Ed.2d 357 (1997).

The Supreme Court held in *J.E.B. v. Alabama*, 511 U.S. 127, 114 S. Ct. 1419, 128 L.Ed.2d 89 (1994), that the use of peremptory challenges solely on the basis of the prospective juror's gender violates the Fourteenth Amendment. *Id.* at 129, 114 S. Ct. at 1421. In *Tokars*, we set forth the analytical framework to be applied to claims arising under *J.E.B.* 95 F.3d at 1533. First, the party challenging the peremptory strike must establish a prima facie case that the prosecutor exercised the peremptory strike for a discriminatory reason. *See id.* Second, if the party succeeds in establishing a prima facie case, the burden shifts to the prosecutor to articulate a gender-neutral explanation for the strike. *See id.* Finally, the trial court "must ascertain whether the opponent of the strike has carried his or her burden of proving intentional discrimination." *Id.*

Here, Steele objected during *voir dire* to the fact that the government used all six of its peremptory challenges on women. We will assume for the purposes of this opinion that the government's use of strikes solely against women successfully established a prima facie case of discrimination; at any rate, the government does not argue that Steele failed to satisfy this obligation. After the district court inquired about the government's strikes, the prosecutor explained that she exercised the challenges because: (a) two of the prospective jurors were elementary school teachers, and the prosecutor was "leery" of school teachers; (b) three of the prospective jurors had worked in the medical industry, and the defendant was a pharmacist; and (c) one of the prospective jurors was a hair stylist, and the prosecutor feared that the juror would hear "gossip" about the case. *See* R6-92-96.

Steele argues that the government's reliance upon the two prospective jurors' jobs as schoolteachers is pretextual in light of the fact that the government did not strike a male project engineer at a junior college, a female school system clerk, and a female retired public school administrator. We disagree. The government rationally could believe that the accepted jurors held jobs that feature entirely different skills and responsibilities than that of an elementary school teacher. At any rate, "a legitimate reason is not a reason that makes sense, but a reason that does not deny equal protection." *See Tokars*, 95 F.3d at 1533. Under the circumstances of this case, Steele has not shown that the prosecutor's decision to strike the school teachers was based upon their gender.

The same can be said of the prosecutor's decision to strike the hair stylist. Regardless of whether the prosecutor's concerns about an exposure to gossip at the workplace was reasonable, the record is devoid of evidence that suggests the decision was based on the juror's gender. As for the final three jurors struck by the government, we find the prosecutor's reasons for striking those with medical backgrounds to be entirely reasonable, and no evidence suggests that malejurors with medical backgrounds were not stricken.

In sum, the common thread to Steele's argument is a lack of persuasive evidence suggesting that the prosecutor based her decisions to strike the six women even in part on their gender. In making this observation, we further note that the ultimate jury panel consisted of ten women and four men, and the unchallenged presence of protected class members on the final jury panel "undercuts [the] inference of impermissible discrimination that might arise solely from [the] striking of other . . . prospective jurors." *United States v. Jiminez*, 983 F.2d 1020, 1024 n.11 (11th Cir. 1993) (considering a race-based challenge to the government's exercise of peremptory challenges). We therefore conclude that the district court did not clearly err in rejecting Steele's argument.

IV. Sufficiency of the Evidence

Steele next argues that the district court erred in rejecting his arguments that insufficient evidence existed to support his convictions. Steele argues that his convictions are based solely upon the testimony of government witnesses Larry and Gloria Ellis. According to Steele, the

Ellis' testimony was so full of lies and manifest inconsistencies that no reasonable juror could believe Larry Ellis' story that Steele agreed to fill prescriptions that he knew Ellis had forged.

We review *de novo* the sufficiency of the evidence to support a conviction, viewing the evidence in the light most favorable to the government and drawing all reasonable inferences and credibility choices in favor of the jury's verdict. *United States v. Fischer,* 168 F.3d 1273, 1276 n.7 (11th Cir. 1999). We have held that, "[f]or testimony of a government witness to be incredible as a matter of law, it must be unbelievable on its face" and must relate to "facts that [the witness] physically could not have possibly observed or events that could not have occurred under the laws of nature." *United States v. Calderon,* 127 F.3d 1314, 1325 (11th Cir. 1997) (internal quotation marks and citation omitted), *cert. denied,* ___ U.S. ___, 118 S. Ct. 1090, 140 L.Ed.2d 146 (1998). An argument that a witness was incredible as a matter of law is weakened when the defendant cross-examined the witness concerning the alleged lies or inconsistencies and the judge instructed the jurors on the degree of suspicion they should hold when considering the witness' testimony, yet the jury chose to accept the witness' testimony. *See id.*

Here, the government indeed based its case against Steele primarily upon the testimony of Larry Ellis, an alleged co-conspirator whose testimony at times was inconsistent. Even so, the government adduced other evidence that corroborated Ellis' story that he and Steele entered an agreement to fill phony prescriptions. Another pharmacist who worked at North Hill Pharmacy testified that the prescriptions forged by Ellis were so suspicious

that she refused to fill them. This pharmacist also testified that she conveyed these suspicions to Steele. A physician further corroborated the suspicious nature of the prescriptions by testifying that, based on the amount of pills contained in each prescription, the prescriptions were "extremely unusual." R8-223. Finally, the clerk at the North Hill Pharmacy testified that, after she questioned Steele about her suspicions regarding the prescriptions, Steele told her that Gloria Ellis, who brought the prescriptions into the pharmacy to be filled, was a nurse for the doctor listed on the phony prescriptions and that the prescriptions were for nursing home patients.

Steele overlooks this corroborating evidence and focuses instead on the lack of credibility that can be given to the testimony of Larry and Gloria Ellis. Steele's lawyer pointed out the inconsistencies in this testimony to the jury during cross-examination, and argued at length that the jury should discredit the testimony. The trial court. instructed the jury concerning the skepticism with which they should consider some witnesses' testimony. The jury nonetheless rejected Steele's argument, and we find that the Ellis' testimony, when considered in light of the other evidence presented at trial, is not so inherently incredible that it cannot form the basis of a conviction under *Calderon*. For these reasons, we conclude that the district court properly rejected Steele's arguments based on the sufficiency of the evidence.

V. Sentencing Issues

The government's cross-appeal alleges that the district court erred in computing Steele's sentence under the

Sentencing Guidelines. During the sentencing hearing, the district court found that the weight of the drugs for which Steele would be held accountable under the Sentencing Guidelines totaled an equivalent of 2,371.03 kilograms of marijuana.[2] In computing the total offense weight, the district court followed the rule set forth in *United States v. Lazarchik*, 924 F.2d 211 (11th Cir. 1991), which provides that the court must use the total weight of the pills distributed by the defendant – that is, the weight of the drug contained in the pill as well as the weight of the substance in which the drug is mixed – rather than just the weight of the drug itself. *See* 924 F.2d at 214. After applying this rule, the district court calculated Steele's offense level as 34 with a sentence range of 151-188 months. The district court nonetheless noted that, if the weight of the substances with which the drugs were mixed to form the pills were excluded and the sentence based solely upon the net weight of drugs contained in the pills, the net weight would be the equivalent of approximately 89 kilograms of marijuana, giving Steele a total offense level of 26 and a sentence range of 63-78 months.

The district court thus concluded that, even though under *Lazarchik* Steele's total offense level was 34, the circumstances warranted a downward departure of eight offense levels pursuant to section 5K2 of the Sentencing

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[2] Pursuant to section 2D1.1 of the Sentencing Guidelines, the district court multiplied the weights of the prescription drugs dispensed by Steele by conversion factors to provide an "equivalent" weight of marijuana that was then used to determine Steele's sentence. *See* U.S. Sentencing Guidelines Manual § 2D1.1 application n.10, at 89 (Nov. 1993 ed.).

Guidelines. This gave Steele a total offense level of 26 and a sentence level of 63-78 months, or the same sentence range that would have applied if the court used only the net weight of the drugs dispensed by Steele. The district court then sentenced Steele to 63 months of imprisonment. The court expressly noted that "a downward departure to the range which would have applied if the net weights were used is appropriate. That range more reasonably fits the actual crime and the 'good citizen' prior record of the defendant." R1-77-6. The government appeals this decision, arguing that the facts and circumstances of the case do not justify a downward departure under section 5K2.

In reviewing the district court's application of the Sentencing Guidelines, we apply the version of the Guidelines in effect on the date of the sentencing hearing, *see United States v. Gunby*, 112 F.3d 1493, 1500 n.9 (11th Cir. 1997), which in this case is the November 1993 edition. Section 5K2 has been amended several times during the pendency of this appeal, but all the amendments have been deemed to be clarifications so we may apply the current language and case law in this appeal. *See id.* We review a district court's decision to depart downward pursuant to section 5K2 for abuse of discretion. *See Koon v. United States*, 518 U.S. 81, 99-100, 116 S. Ct. 2035, 2047 135 L.Ed.2d 392 (1996).

Generally, a sentencing court must impose a sentence within the range provided for in the Sentencing Guidelines unless the court finds there exists a "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a

sentence different from that described." U.S. Sentencing Guidelines Manual § 5K2.0 (Nov. 1998 ed.) (setting forth policy statement for departures under section 5K2). In *Koon*, the Supreme Court clarified the application of this section, holding that the unusual circumstances justifying a departure must take the case outside the "heartland" of cases contemplated by the applicable guidelines. *See* 518 U.S. at 94-96, 116 S. Ct. at 2045.

To aid in this review, this circuit adopted a rule that "a district court granting a downward departure must articulate the specific mitigating circumstances upon which it relies and the reasons why these circumstances take a case out of the guidelines' heartland." *United States v. Tomono*, 143 F.3d 1401, 1403 (11th Cir. 1998) (per curiam). Once the court identifies these circumstances, three questions must be answered before deciding whether a departure is justified: (1) did the Sentencing Commission forbid departure based on the particular circumstances; (2) if not, did the Commission encourage departure based on the particular circumstances; and (3) if not, did the Commission discourage departure based on the particular circumstances? *See United States v. Willis*, 139 F.3d 811, 812 (11th Cir. 1998) (per curiam). If the circumstance is not encouraged or discouraged by the Commission, "the court must, after considering the structure and theory of both relevant individual guidelines and the Guidelines taken as a whole, decide whether it is sufficient to take the case out of the Guideline's heartland." *Koon*, 518 U.S. at 96, 116 S. Ct. at 2045 (internal quotations omitted). Moreover, the court "must bear in mind the Commission's expectation that departures based on grounds not

mentioned in the Guidelines will be 'highly infrequent.' " *Id.* (citation omitted).

The district court departed downward pursuant to section 5K2 on five grounds: (a) Steele's conduct – dispensing prescription drugs that were legally in his possession by filling forged prescriptions that appeared to be otherwise valid – was not the target of § 841(a)(1), which was aimed more at street dealers who sell illegal narcotics; (b) Steele received additional punishment beyond his criminal sentence by losing his pharmacist's license; (c) the computation of the drug weights in this case created a disparity when compared to drugs that are not mixed with other compounds to form tablets or pills; (d) Steele made only a nominal profit from the drug sales in this case (approximately $700, or the price of eight ounces of marijuana), but was held accountable at sentencing for the equivalent of 5,227 pounds of marijuana; and (e) Steele incurred a "serious medical problem" that "apparently affected his mental functioning" at the time of the offense. R1-77-5-6.

The district court's first ground for departure reflects a belief that Steele was convicted not of unlawful drug trafficking, but of failing to recognize that the prescriptions presented by Larry and Gloria Ellis were forged, which the court described as less culpable behavior. The Guidelines do not list this factor as a ground for departure and do not encourage or discourage courts from considering such a factor. As described earlier in this opinion, however, the government alleged that, and adduced sufficient evidence to prove that, Steele knowingly agreed with Larry Ellis to fill phony prescriptions for a person who had no medical need for the drugs.

Moreover; the jury believed this evidence. As summarized by the First Circuit in *United States v. Limberopoulos*, 26 F.3d 245 (1st Cir. 1994), this conduct falls expressly within the heartland of a drug trafficking offense as defined by § 841(a)(1). *See* 26 F.3d at 249-51. *Limberopoulos* is factually analogous to this case, as the government claimed that the defendant pharmacists knowingly filled fraudulent prescriptions to people who had no legitimate medical need for the drugs, and the jury refused to believe the defendants' arguments that they acted in good faith. *See id.* at 250-51. As the *Limberopoulos* court explained, "if the drug-dispensing pharmacist knows that a customer not only lacks a valid prescription but also will not use the drugs for legitimate medical purposes, then section 841 applies in full flower and treats the dispenser like a pusher." *Id.* at 250. Consequently, for the same reasons as set forth in *Limberopoulos*, we conclude that the district court abused its discretion in relying on this ground to depart downward.

The district court's second ground for departing downward was that Steele would lose his pharmacist's license, which the district court categorized as a "major additional punishment . . . which has not been addressed by the Sentencing Commission." R1-77-5. In an opinion published after the date of the sentencing hearing, this court concluded that the loss of a medical license may not serve as a ground for departure when the offense for which the defendant is convicted reflects an abuse of the trust inherent in the granting of the license to the defendant. *See United States v. Hoffer*, 129 F.3d 1196, 1204-06 (11th Cir. 1997). A departure under such circumstances, the court observed, would negate an enhancement for the

abuse of a special position to facilitate the crime that is mandated pursuant to other sections of the Guidelines. *See id.* at 1205. The conclusion reached in *Hoffer* applies with equal force here, where the district court's departure based on Steele's loss of his pharmacist license would negate an enhancement imposed for Steele's abuse of his position as a pharmacist. Under these circumstances, *Hoffer* dictates that the district court abused its discretion in departing downward on this ground.

The district court's third ground for departing downward was that the inclusion of the substances with which the drugs were mixed to form tablets and pills when computing the drug weights to be used for sentencing purposes created a disparity when compared to cases involving drugs that are not mixed with other substances. The district court's reasoning, however, directly contradicts the rule set forth in *Lazarchik* for sentencing defendants who are convicted of offenses involving drugs in pill form. *Lazarchik* mandates that, when computing the amount of drugs attributed to a defendant under the guidelines, the court must include the weight of the substances with which the drugs are mixed to form pills or syrups. *See* 924 F.2d at 214. The ground relied upon by the district court therefore is expressly precluded, because allowing a downward departure on this ground would abrogate the requirement that the substances mixed with drugs be included in the total drug weight. The district court's effort to use section 5K2 to craft a sentence based on the net weight of the drugs therefore constituted an abuse of discretion.

The district court's fourth ground for departing downward was that the defendant made a nominal profit

from the sale of the drugs, while the length of his sentence is more consistent with an amount of drugs that has an enormous street value. Lack of personal profit is not a factor that is included in the Guidelines' list of encouraged or discouraged factors, and therefore we must determine whether the nominal profit earned by Steele takes the case out of the "heartland." Courts that have considered downward departures based on this ground have generally disfavored the reasoning relied upon by the district court. *See United States v. Broderson*, 67 F.3d 452, 458-59 (2d Cir. 1995); *United States v. Seacott*, 15 F.3d 1380, 1387 (7th Cir. 1994). As noted in *Broderson*, "lack of personal profit ordinarily [is not] a ground for departure, because the Commission generally took that factor into account in drafting the Guidelines." 67 F.3d at 459; *see also Seacott*, 15 F.3d at 1387 (observing, after listing several provisions in the Guidelines that address profits by the defendant, that "[g]iven the frequency with which the drafters of the Guidelines specifically adjusted offense levels based on whether the defendant was motivated by profit, we must assume that had they been interested in providing for such an adjustment . . . they would have done so"). Here, we confront a case in which the jury concluded that the defendant agreed to sell prescription drugs to a person who notified him beforehand that the prescriptions were phony. In all varieties of drug distribution cases, defendants have experienced difficulties in turning profits and even incurred losses for their efforts. We cannot say that such cases fall outside the heartland of drug distribution cases. Rather, we conclude that, despite the nominal profits earned by Steele in filling the forged prescriptions, this case fails to present sufficiently

unusual circumstances that would permit the district court to depart downward pursuant to section 5K2. The district court therefore abused its discretion in relying on this ground.

The fifth ground relied upon by the district court was that Steele had incurred a "serious medical problem" that had affected his mental functioning at the time of the offenses. The Commission expressly encourages district courts to consider whether the defendant suffered from "significantly reduced mental capacity" at the time of the offense when deciding whether to grant a downward departure. U.S. Sentencing Guidelines Manual § 5K2.13. In order to warrant a departure, the diminished capacity must be linked to the commission of the offense. *See United States v. Miller*, 146 F.3d 1281, 1285 (11th Cir. 1998), *cert. denied*, ___ U.S. ___ 119 S. Ct. 915, 142 L.Ed.2d 912 (1999).

During the pendency of this appeal, the Sentencing Commission amended section 5K2.13 by completely replacing the text of the section and adding an application note. *See* U.S. Sentencing Guidelines Manual § 5K2.13 (Nov. 1998 ed.). The application note defines "significantly reduced mental capacity" to mean that the defendant "has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful." *Id.* application n. 1. The amended section also provides that, "[i]f a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense." *Id.* § 5K2.13. The district court made no specific

findings whether Steele's diminished mental capacity contributed to the commission of the crime.

Given our earlier conclusion that the district court abused its discretion in relying on the first four grounds for the downward departure granted in this case, we conclude that the present sentence must be vacated and a new sentencing hearing held. During the new sentencing hearing, the amended version of section 5K2.13 will apply. The opportunity thus arises for the district court to determine in the first instance whether the evidence regarding Steele's mental condition continues to justify a downward departure according to the new language. Moreover, if the court determines that a downward departure indeed is warranted, the court may assess anew the extent of the departure in light of its findings of how much the impairment contributed to the commission of the offense. We therefore decline to reach a conclusion whether the district court abused its discretion in departing on this ground and instead remand the issue to the district court to reassess in light of the changes in the law and posture of this case.

VI. Conclusion

For the reasons set forth in this opinion, we **AFFIRM** Steele's conviction but **VACATE** Steele's sentence and **REMAND** for resentencing proceedings consistent with this opinion.

APPENDIX C

UNITED STATES of America, Plaintiff-Appellee, Cross-Appellant,

v.

William O. STEELE, Defendant-Appellant, Cross-Appellee.

No. 94-3139.

United States Court of Appeals,
Eleventh Circuit.

Feb. 11, 1997.

Before TJOFLAT and BIRCH, Circuit Judges, and SMITH*, Senior Circuit Judge.

BIRCH, Circuit Judge:

This appeal presented the issue of whether an indictment charging a pharmacist with dispensing controlled substances in violation of 21 U.S.C. § 841(a)(1) must allege conduct outside the scope of professional practice. The indictment in this case did not allege that the pharmacist's conduct was outside the scope of professional conduct, but the pharmacist was convicted. We REVERSE.

I. BACKGROUND

Defendant-appellant, William O. Steele, was a registered pharmacist at North Hill Pharmacy in Pensacola

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* Honorable Edward S. Smith, Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

Florida. Allegedly with full knowledge that the prescriptions for controlled substances were forged, Steele filled numerous prescriptions for Larry and Gloria Ellis over the course of several months. The Ellises, who were convicted for passing forged prescriptions at North Hill Pharmacy, testified against Steele and are serving their sentences.

A four-count indictment charged Steele with dispensing the controlled substances commonly known as Dilaudid, Xanax, Valium, and Percodan in violation of section 841(a)(1). Section 841(a)(1) provides that "[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally – (1) to manufacture, distribute, or dispense . . . a controlled substance." Each count of the indictment tracks the statutory language and is identical to the other counts except for the identification of different controlled substances in each count. Count One, for example, provides as follows:

> That from on or about July 1, 1993, and continuously thereafter, up to and including on or about November 2, 1993, in the Northern District of Florida, the defendant, William O. Steele, did knowingly and intentionally dispense hydromorphone hydrochloride, a schedule II controlled substance, commonly known as Dilaudid, in violation of Title 21, United states Code, Section 841(a)(1).

Steele filed a motion for a bill of particulars or, alternatively, for dismissal of the indictment for lack of specificity. The district court denied the motion.

The first trial ended in a mistrial when the jury could not reach a verdict. At the conclusion of the government's

case in the second trial, Steele filed a motion for a judgment of acquittal and alleged in part that the indictment failed to charge that Steele had dispensed the controlled substances contrary to the ordinary course of his professional practice as a registered pharmacist. The court denied the motion, and the defense rested without presenting evidence. Steele was convicted on all four counts.

Steele raises three issues on appeal: 1) insufficiency of the indictment, 2) gender bias in the government's peremptory strikes during jury selection, and 3) insufficiency of the evidence. The government cross-appeals the court's downward departure from the Sentencing Guidelines. Because we find that the indictment was insufficient and reverse the conviction, we do not reach the other issues raised by Steele or the government's cross-appeal related to sentencing.

II. DISCUSSION

Whether an indictment sufficiently alleges a crime is a question of law. *Rodriguez v. Ritchey*, 556 F.2d 1185, 1191 n. 22 (5th Cir.1977), *cert. denied*, 434 U.S. 1047, 98 S.Ct. 894, 54 L.Ed.2d 799 (1978). We review questions of law *de novo*. *United States v. Shenberg*, 89 F.3d 1461, 1478 (11th Cir.1996). Steele argues that, because he is a registered pharmacist who can lawfully dispense controlled substances under 21 U.S.C. § 822(b), the indictment must allege that he dispensed the controlled substances outside the scope of his professional practice.[1] The government

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[1] Although Steele makes several arguments to support his allegation that the indictment is insufficient, we need address

contends that the indictment includes each element of the offense because it tracks the language of section 841(a)(1) and because the exception for practitioners is an affirmative defense which must be raised by the defendant.

Practitioners, such as physicians and pharmacists,[2] who legally can dispense controlled substances can be convicted under section 841(a)(1) when their actions fall outside the scope of legitimate professional practice. The Supreme Court affirmed a conviction of a physician under section 841(a)(1) because he exceeded the bounds of legitimate medical practice. *United States v. Moore,* 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed.2d 33 (1975). We subsequently have held that pharmacists are similarly subject to conviction under the statute when their activities fall outside the usual course of professional practice. *United States v. Hayes,* 595 F.2d 258 (5th Cir.), *"cert. denied,* 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 89 (1979). The issue here is whether behavior outside the scope of professional practice must be alleged in the indictment when a pharmacist is charged under section 841(a)(1) for dispensing controlled substances. It is an established rule that each essential element of an offense must be alleged in an indictment. *E.g., United States v. Debrow,* 346 U.S. 374, 376, 74 S.Ct. 113, 114, 98 L.Ed. 92 (1953). Thus, an indictment using only statutory language is sufficient only if the statute itself sets forth all essential elements of the offense. *United States v. Carll,* 105 U.S. 611, 612, 26 L.Ed.

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only whether the indictment fails to allege each element of the offense.

[2] Physicians and pharmacists are both defined as "practitioners" in 21 U.S.C. § 802(20).

1135 (1881). "If the statute omits an essential element of the offense, or includes it only by implication, then pleading the statutory language will not suffice, and the omitted element must be alleged directly and with certainty." 1 Charles A. Wright, *Federal Practice and Procedure* § 125, at 369-70 (2d ed.1982) (collecting cases). In contrast, an affirmative defense need not be negated in an indictment, *United States v. Sisson*, 399 U.S. 267, 288, 90 S.Ct. 2117, 2128, 26 L.Ed.2d 608 (1970). Thus, in this case, the necessity of including an allegation of behavior outside the scope of professional practice in the indictment turns on whether it is an essential element of the offense or an affirmative defense that should properly be proved by Steele.

In *United States v. Outler*, 659 F.2d 1306, 1309 (5th Cir. Unit B 1981), *cert. denied*, 455 U.S. 950, 102 S.Ct. 1453, 71 L.Ed.2d 665 (1982), we held that behavior outside the scope of professional practice is an essential element of the offense when a physician is charged under section 841(a)(1). We rejected the government's argument in *Outler* that acting within the scope of legitimate medical practice is an affirmative defense that a physician must raise because we believed that Congress did not intend a presumption that physicians who dispense controlled substances do so without legitimate reasons. *Id.* at 1309-1310 & n. 3. We similarly believe that Congress intended no such result for registered pharmacists who dispense controlled substances and, thus, reject the argument that behavior within the scope of professional practice is an affirmative defense for pharmacists charged under section 841(a)(1).

The government sought to distinguish *Outler* from the present case on the basis of language in the *Outler* indictment that is lacking in Steele's indictment. The government argued that, because the indictment in *Outler* included the phrase "by means of a prescription," the indictment on its face was misleading to the grand jury without an allegation that the drugs were prescribed without a legitimate medical purpose. The government further argued that use of the word "prescription" in the *Outler* indictment implied a practitioner whereas Steele's indictment made no reference to his status as a pharmacist and was, consequently, sufficient on its face.

We are unpersuaded by the government's argument for several reasons. First, the word "dispense," like the word "prescribe," implies a practitioner. Section 802(10) defines "dispense" as "deliver a controlled substance to an ultimate user . . . by, or pursuant to the lawful order of, *a practitioner,* including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for delivery." 21 U.S.C. § 802(10) (emphasis added). Thus, "dispense" by statutory definition is delivery performed by a practitioner.

Second, the analysis in *Outler* did not turn on the use of the language "by means of a prescription." In fact, we used the terms "prescribe" and "dispense" interchangeably in *Outler,* 659 F.2d at 1308 ("Counts One through Fifteen involved charges of prescribing or, in the language of the [Controlled Substances Act], 'dispensing' controlled drugs.").

Finally, we reject the government's argument because an indictment which on its face does not identify the defendant as a practitioner does not change the essential elements of the offense when a practitioner is prosecuted under section 841(a)(1) for illegally dispensing controlled substances. In *Outler* we held that the element of behavior beyond professional practice must be alleged in an indictment "*whenever* a physician is charged with [dispensing] drugs in violation of 21 U.S.C. § 841(a)." Id. at 1310 (emphasis added). The reasoning in *Outler* logically extends to practitioners like pharmacists who "dispense" controlled substances.

As in *Outler*, we have little doubt that an indictment alleging behavior outside the scope of professional practice would have allowed a grand jury to find probable cause for the offense in this case. The rule that each essential element must be alleged in an indictment, however, serves to ensure certain basic protections provided by the Fifth and Sixth Amendments of the Constitution.[3] We cannot speculate as to the grand jury's decision in view of the government's failure to allege each essential element of the offense without potentially "depri[ving] the defendant of a basic protection which the guarantee

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[3] The Sixth Amendment provides that the criminal defendant "be informed of the nature and cause of the accusation." U.S. Const. amend. VI. The Fifth Amendment guarantees that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. Requiring that each essential element be alleged in the indictment serves to inform the defendant of the alleged offense and to ensure that the grant jury properly determines probable cause.

of the intervention of a grand jury was designed to secure." *Outler*, 659 F.2d at 1311 (quoting *Russell v. United States*, 369 U.S. 749, 770, 82 S.Ct. 1038, 1050, 8 L.Ed.2d 240 (1962)). Thus, the indictment is insufficient to support the conviction.

III. CONCLUSION

In this appeal, Steel argues that the indictment was insufficient to support his conviction under section 841(a)(1). Each essential element of an offense must be alleged in an indictment, and behavior outside the scope of professional practice is an essential element of the offense whenever a practitioner is charged with dispensing drugs in violation of section 841(a)(1). Thus, as we have analyzed herein, an indictment failing to allege this essential element when a practitioner is charged with illegally dispensing controlled substances cannot support a conviction. Accordingly, we REVERSE.

APPENDIX D

UNITED STATES of America, Plaintiff-Appellee, Cross-Appellant,

v.

William O. STEELE, Defendant-Appellant, Cross-Appellee.

No. 94-3139.

United States Court of Appeals,
Eleventh Circuit.

July 24, 1997.

Before TJOFLAT and BIRCH, Circuit Judges, and SMITH* Senior Circuit Judge.

ON PETITION FOR REHEARING

BIRCH, Circuit Judge.

The Government petitions for a panel rehearing. We grant the petition and substitute the following opinion for the previous opinion reported at 105 F.3d 603 (11th Cir. 1997).

I. OVERVIEW

This appeal presents the issue of whether an indictment charging a pharmacist with dispensing controlled substances in violation of 21 U.S.C. § 841(a)(1) must allege conduct outside the scope of professional practice.

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* Honorable Edward S. Smith, Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

The indictment in this case did not allege that the pharmacist's conduct was outside the scope of professional conduct, but the pharmacist was convicted. Because we are bound by a prior panel decision holding that the indictment of a practitioner must allege behavior outside the scope of professional practice, we REVERSE.

II. BACKGROUND

Defendant-appellant, William O. Steele, was a registered pharmacist at North Hill Pharmacy in Pensacola, Florida. Allegedly with full knowledge that the prescriptions for controlled substances were forged, Steele filled numerous prescriptions for Larry and Gloria Ellis over the court of several months. The Ellises, who were convicted for passing forged prescriptions at North Hill Pharmacy, testified against Steele and are serving their sentences.

A four-count indictment charged Steele with dispensing the controlled substances commonly known as Dilaudid, Xanax, Valium, and Percodan in violation of section 841(a)(1). Section 841(a)(1) provides that "[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally – (1) to manufacture, distribute, or dispense . . . a controlled substance." Each count of the indictment tracks the statutory language and is identical to the other counts except for the identification of a different controlled substance in each count. Count One, for example, provides as follows:

> That from on or about July 1, 1993, and continuously thereafter, up to and including on or about November 2, 1993, in the Northern District of

> Florida, the defendant, William O. Steele, did knowingly and intentionally dispense hydromorphone hydrochloride, a schedule II controlled substance, commonly known as Dilaudid, in violation of Title 21, United States Code, Section 841(a)(1).

Steele filed a motion for a bill of particulars or, alternatively, four dismissal of the indictment for lack of specificity. The district court denied the motion.

The first trial ended in a mistrial when the jury could not reach a verdict. At the conclusion of the government's case in the second trial, Steele filed a motion for judgment of acquittal and alleged in part that the indictment failed to charge that Steele had dispensed the controlled substances contrary to the ordinary course of his professional practice as a registered pharmacist. The court denied the motion, and the defense rested without presenting evidence. Steele was convicted on all four counts.

Steele raises three issues on appeal: 1) insufficiency of the indictment, 2) gender bias in the government's peremptory strikes during jury selection, and 3) insufficiency of the evidence. The government cross-appeals the court's downward departure from the Sentencing Guidelines. Because we find, in view of binding circuit precedent, that the indictment was insufficient and reverse the conviction, we do not reach the other issues raised by Steele or the government's cross-appeal related to sentencing.

III. DISCUSSION

Whether an indictment sufficiently alleges a statutorily proscribed offense is a question of law. *Rodriquez v. Ritchey*, 556 F.2d 1185, 1191 n. 22 (5th Cir.1977), *cert. denied*, 434 U.S. 1047, 98 S.Ct. 894, 54 L.Ed.2d 799 (1978). We review questions of law *de novo*, *United States v. Shenberg*, 89 F.3d 1461, 1478 (11th Cir.1996). Steele argues that, because he is a registered pharmacist who lawfully can dispense controlled substance under 21 U.S.C. § 822(b), the indictment must allege that he dispensed the controlled substances outside the scope of his professional practice.[1] The government contends that the indictment includes each element of the offense because it tracks the language of section 841(a)(1) and because the exception for practitioners is an affirmative defense which must be raised by the defendant. In addition, the government points to 21 U.S.C. § 885(a)(1), which provides that the indictment need not negate a statutory exception.[2]

Practitioners, such as physicians and pharmacists,[3] who legally can dispense controlled substances can be convicted under section 841(a)(1) when their actions fall outside the scope of legitimate professional practice. The

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[1] Although Steele makes several arguments to support his allegation that the indictment is insufficient, we need address only whether the indictment fails to allege each element of the offense.

[2] The government first raised the statutory argument in this petition for rehearing.

[3] Physicians and pharmacists are both defined as "practitioners" in 21 U.S.C. § 802(20).

Supreme Court previously has affirmed a conviction of a physician under section 841(a)(1) because he exceeded the bounds of legitimate medical practice. *United States v. Moore*, 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975). We subsequently held that pharmacists similarly are subject to conviction under the statute when their activities fall outside the usual course of professional practice. *United States v. Hayes*, 595 F.2d 258 (5th Cir.), *cert. denied*, 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 89 (1979).

The issue here is whether behavior outside the scope of professional practice must be alleged in the indictment when a pharmacist is charged under section 841(a)(1) for dispensing controlled substances. It is an established rule that each essential element of an offense must be alleged in an indictment. *E.g., United States v. Debrow*, 346 U.S. 374, 376, 74 S.Ct. 113, 114, 98 L.Ed.92 (1953). Thus, an indictment using only statutory language is sufficient only if the statute itself sets forth all essential elements of the offense. *United States v. Carll*, 105 U.S. 611, 612, 26 L.Ed. 1135 (1881). "If the statute omits an essential element of the offense, or includes it only by implication, then pleading the statutory language will not suffice, and the omitted element must be alleged directly and with certainty." 1 Charles A. Wright, *Federal Practice and Procedure* § 124, at 369-70 (2d ed.1982) (collecting cases). In contrast, an affirmative defense need not be negated in an indictment. *United States v. Sisson*, 399 U.S. 267, 288, 90 S.Ct. 2117, 2128, 26 L.Ed.2d 608 (1970). Thus, in this case, the necessity of including an allegation of behavior outside the scope of professional practice in the indictment turns on whether it is an essential element of the offense

or an affirmative defense, which should properly be proved by Steele.

> Under section 885, the United States [is not required] to negative any exemption or exception set forth in [the] subchapter [pertaining to control and enforcement of drug abuse prevention] in any complaint, information, indictment, or other pleading . . . , and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.

21 U.S.C. § 885. "Practitioners" fall within an exception to 21 U.S.C. § 841, which provides that it is illegal to make, sell, or possess controlled substances "[e]xcept as authorized by this subchapter." Thus, under statutory law, status as a practitioner is an affirmative defense, and an indictment for a violation of section 841 need not allege that a pharmacist is acting outside the scope of professional practice.

Our analysis, however, cannot stop with the statute. We must also look to binding case law, even when it conflicts with the statutory law. In *United States v. Outler*, 659 F.2d 1306, 1309 (5th Cir. Unit B 1981), *cert. denied*, 455 U.S. 950, 102 S.Ct. 1453, 71 L.Ed.2d 665 (1982), we held that behavior outside the scope of professional practice is an essential element of the offense when a physician is charged under section 841(a)(1). Without addressing section 841(a)(1),[4] we rejected the government's argument in

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[4] In *Outler*, we based our ruling on the constitutional principles of the Fifth and Sixth Amendments. We refused to speculate as to the grand jury's decision in view of the

Outler that acting within the scope of legitimate medical practice is an affirmative defense that a physician must raise. In reaching this determination, we reasoned that Congress did not intend a presumption that physicians who dispense controlled substances do so without legitimate reasons. *Id.* at 1309-10 & n. 3.

The government seeks to distinguish *Outler* from the present case on the basis of language in the *Outler* indictment that is lacking in Steele's indictment. The government argues that, because the indictment in *Outler* included the phrase "by means of a prescription" and did not include an allegation that the drugs were prescribed without a legitimate medical purpose, the indictment on its face was misleading to the grand jury. The government further argues that use of the word "prescription" in the *Outler* indictment implied a practitioner whereas Steele's indictment made no reference to his status as a pharmacist and was, consequently, sufficient on its face.

We are unpersuaded by the government's attempt to distinguish *Outler*. First, the word "dispense," like the word "prescribe," implies a practitioner. Section 802(10) defines "dispense" as "delivered a controlled substance to an ultimate user . . . by, or pursuant to the lawful order

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government's failure to allege each essential element of the offense without potentially "depri[ving] the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure." *Outler*, 659 F.2d at 1311 (quoting *Russell v. United States*, 369 U.S. 749, 770, 82 S.Ct. 1038, 1050, 8 L.Ed.2d 240 (1962)).

of, a *practitioner,* including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for delivery." 21 U.S.C. § 802(10) (emphasis added). Thus, "dispense" by statutory definition is delivery performed by a practitioner.

Second, the analysis in *Outler* did not turn on the use of the language "by means of a prescription." In fact, we used the terms "prescribe" and "dispense" interchangeably in *Outler*. 659 F.2d at 1308 ("Counts One through Fifteen involved charges of prescribing or, in the language of the [Controlled Substances Act], 'dispensing' controlled drugs.").

Finally, we reject the government's attempt to distinguish *Outler* because an indictment which on its face does not identify the defendant as a practitioner does not change the essential elements of the offense when a practitioner is prosecuted under section 841(a)(1) for illegally dispensing controlled substances. In *Outler* we held that the element of behavior beyond professional practice must be alleged in an indictment "*whenever* a physician is charged with [dispensing] drugs in violation of 21 U.S.C. § 841(a)." Id. at 1310 (emphasis added). The reasoning in *Outler* logically extends to practitioners like pharmacists who "dispense" controlled substances.

The holding in *Outler* stands in apparent conflict with section 885(a)(1). Nonetheless, we find that the *Outler* decision controls in the case.[5] Because we are bound by

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[5] "The law in this circuit is emphatic that 'only a decision by this court sitting *en banc* or the United States Supreme Court

Outler, we determine that the indictment is insufficient to support the conviction.

IV. CONCLUSION

In this appeal, Steele argues that the indictment was insufficient to support his conviction under 21 U.S.C. § 841(a)(1) because it failed to allege each essential element of the offense. In an earlier panel decision by this court, we determined that behavior outside the scope of professional practice is an essential element of the offense whenever a practitioner is charged with dispensing drugs in violation of section 841(a)(1). This decision apparently conflicts with 21 U.S.C. § 885(a)(1), which provides that the practitioner exception is an affirmative defense that the government need not allege in the indictment. Despite this apparent conflict, however, we are bound by our circuit precedent holding that an indictment failing to allege behavior outside the scope of professional practice cannot support a conviction when a practitioner is charged with illegally dispensing controlled substances. We therefore conclude, as we did in our prior panel opinion, that the indictment in this case was insufficient to support the conviction. Accordingly, we REVERSE.

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can overrule a prior panel decision.' " *United States v. Woodard*, 938 F.2d 1255, 1258 (11th Cir.1991) (quoting *United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir.1986)). Thus, even if it conflicts with statutory law, we are bound by *Outler* until such time as it is overruled.

APPENDIX E

Constitutional and Statutory Provisions Involved in the Case

1. The Fifth Amendment to the Constitution of the United States, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment to the Constitution of the United States, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed by the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

3. Section 841(a)(1) of Title 21, United States Code, which provides:

> (a) Unlawful Acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally – (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

4. Section 822(b) of Title 21, United States Code, which provides:

> (b) Persons registered by the Attorney General under this subchapter to manufacture, distribute or dispense controlled substances or list I chemicals are authorized to possess, manufacture, distribute, or dispense such substances or chemicals (including any such activity in conduct of research) to the extent authorized by their registration and in conformity with the other provisions of this subchapter.

5. Section 823(f) of Title 21, United States Code, which provides:

> (f) The Attorney General shall register practitioners (including pharmacies, as distinguished from pharmacists) to dispense, or conduct research with controlled substances in schedule II, III, IV, or V if the applicant is authorized to dispense, or conduct research with respect to, controlled substances under the laws to the State in which he practices.

6. Section 802(10) of Title 21, United States Code, which provides:

> (10) The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance

> and the packaging, labeling, or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

7. Section 802(21) of Title 21, United States Code, which provides:

> (21) The term "practitioner" means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

8. Section 885(a)(1) of Title 21, United States Code, which provides:

> It shall not be necessary for the United States to negative any exemption or exception set forth in this subchapter in any complaint, information, indictment or other pleading, and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.